

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:)	
)	
DETERMINATION OF RATES)	Docket No. 21-CRB-0001-PR
AND TERMS FOR MAKING AND)	(2023-2027)
DISTRIBUTING PHONORECORDS)	
(Phonorecords IV))	
)	

**AMAZON’S CONDITIONAL MOTION TO COMPEL
FINANCIAL DOCUMENTS FROM COPYRIGHT OWNERS**

Amazon files this conditional motion to compel to ensure that discovery in this proceeding is a two-way street. The Copyright Owners have refused to produce any documents regarding the complementary revenues they receive as a result of interactive streaming. They argue that those documents are not directly related to their Written Direct Statement because their rate proposal is not based on their revenues. But they have simultaneously moved to compel Amazon to produce complementary revenue documents even where it, too, has not proposed a revenue-based rate.¹ The Copyright Owners argue that a service’s complementary revenues are *always* relevant under the willing-buyer-willing-seller standard.

The Copyright Owners are incorrect, as Amazon showed in opposing their motion to compel,² and the Judges should deny that motion and this one. But the Copyright Owners cannot have it both ways: if documents regarding the supposed complementary revenues a licensee earns from interactive streaming are always relevant to determining the rate a willing buyer would pay, then complementary revenues a licensor earns must also always be relevant to

¹ Copyright Owners’ Motion to Compel Production of Financial Documents from Amazon (Jan. 27, 2022) (“Motion” or “Mot.”).

² Amazon’s Opposition to Copyright Owners’ Motion to Compel Production of Financial Documents from Amazon (Feb. 10, 2022) (“Opposition” or “Opp.”).

determining the rate a willing seller would accept. The Copyright Owners themselves include large conglomerates with other business lines that benefit from interactive streaming beyond the mechanical royalty rate. Therefore, if the Judges were to accept the Copyright Owners' position, the Judges should also compel the Copyright Owners to produce the comparable complementary revenue information that Amazon seeks.

BACKGROUND

To obtain information from the Copyright Owners about complementary revenues they earn from interactive streaming, Amazon served the following three requests for production of documents ("RFPs"), which seek:

- 154. All regular or periodic Analysis that reports Business Metrics concerning music publishing.
- 155. All Analysis concerning projected costs, revenues, profits or other Business Metrics concerning music publishing.
- 157. All Analysis concerning the relationship between Your members' publishing and songwriting lines of business and any other of Your lines of business, including any connection to Your affiliated Record Companies or recording artists, and shared costs or revenues across business lines. Responsive documents include, but are not limited to, Analysis about any effect that Your publishing or songwriting lines of business have on the revenues generated by Your affiliated Record Companies.

Young Decl. (Opp.), Ex. 1 (Amazon's Second Set of RFPs) at 11.³ The Copyright Owners acknowledged that these requests "duplicate" requests the Copyright Owners served on Amazon. Young Decl., Ex. 3 (Ltr. from M. Harris to J. Branson (Dec. 21, 2021)) at 7.⁴ But they objected

³ "Business Metrics" is defined as "data demonstrating songwriter lifetime value or output, songwriter willingness to accept advances or royalties, songwriter costs, other costs, average revenue per song, songwriter retention, revenues, royalties, profits, or profit margins." *Id.* at 2.

⁴ RFPs 154, 155, and 157 functionally are identical to RFPs 12, 14, and 62 that the Copyright Owners served on Amazon. *See Semel Decl. (Mot.)*, Ex. 10 (Copyright Owners' First Set of RFPs to Amazon) at 15-16, 23.

to these requests in full, when served on them, and refused to produce any responsive documents. Young Decl., Ex. 2 (Copyright Owners’ Responses and Objections to Amazon’s Second Set of RFPs) at 6-7, 8-9. The Copyright Owners assert that the requests are irrelevant because “the music publishers did not” “put their revenue (and its source and calculation) at issue” by proposing a rate structure based on the Copyright Owners’ revenues. Young Decl., Ex. 3 at 7.⁵

Amazon likewise did not propose royalty rates based on revenues for its Prime Music service. Instead, Amazon proposed a per-play rate based on [REDACTED].⁶ Yet the Copyright Owners moved to compel Amazon to produce documents regarding complementary revenues tied to its Prime Music service, arguing that, “[u]nder the willing buyer/willing seller standard,” all “gains from the compulsory license are relevant *regardless of the royalty metric.*” Mot. at 5 n.4 (emphasis added).

ARGUMENT

As Amazon explains in its Opposition to the Copyright Owners’ Motion, the willing-buyer-willing-seller standard does not override the regulation limiting discovery to materials “directly related” to a participant’s written direct statement. 37 C.F.R. § 351.5(b)(1). The Judges never have endorsed the Copyright Owners’ view in any prior ratesetting proceeding under the willing-buyer-willing-seller standard and should not do so here. *See* Opp. at 7-9. The Judges should deny that aspect of the Copyright Owners’ Motion — and, if they do, should deny this motion as well. Indeed, Amazon [REDACTED]

⁵ The parties thus met and conferred and were unable to resolve the matter.

⁶ For other service categories, including those that include Amazon’s Unlimited and Free offerings, Amazon did propose revenue-based rates. As to those services, Amazon produced “*thousands of pages*” discussing the relationship between its revenues and other Amazon business lines.” Opp. at 1; *see also id.* at 14 (confirming “Amazon produced responsive documents”). To the extent the Copyright Owners seek more, their requests are duplicative and burdensome. *See id.* at 12-17.

████████████████████ — and proposed a per-play rate for Prime Music based on ██████████ — because ██████████

████████████████████ . See Written Direct Testimony of James Duffett-Smith ¶¶ 105-106, 195-213.

If the Judges were to accept the Copyright Owners’ novel position that a service’s complementary revenues necessarily are related to any rate proposal that seeks to identify what a willing buyer would pay for the license at issue, it follows that the Copyright Owners’ complementary revenues necessarily are related to what a willing seller would accept for that same license. The Copyright Owners, for example, insist that “a per-play rate does not exist in thin air, divorced from the business operation that pays the royalty.” Copyright Owners’ Reply in Supp. of Mot. at 5. But the same is true of the business operation that receives the royalty and benefits from the dissemination of its works to the public. Discovery cannot be a one-way street. Amazon thus moves conditionally to compel the Copyright Owners to produce documents about their complementary revenues from interactive streaming (RFPs 154, 155, 157).⁷

The Copyright Owners represent music publishers, including Sony, Warner Chappell Music, and Universal Music Publishing Group, that belong to large conglomerates that include affiliated record companies and, in the case of Sony in particular, affiliated technology, hardware, and film companies. Music streaming benefits other parts of their businesses, so they too earn complementary revenues. For example, in addition to generating royalties for their affiliated record labels, streaming can increase sales of physical recordings and digital downloads for customers that want permanent copies of music they are, in effect, leasing through

⁷ Amazon conditionally moves to compel on these requests only insofar as they seek information about complementary revenues, and Amazon reserves the right to move for additional documents that fall within the scope of RFPs 154, 155, and 157.

interactive streaming.⁸ It can benefit the companies that own patents in the codecs that must be licensed to play digital music files.⁹ At least one publisher (Sony) sells WiFi-enabled smart speakers and promotes them as optimized for streaming music¹⁰ — to the extent increased streaming music usage drives those sales, Sony benefits from that complementary revenue as well. In the case of Disney — another member of the NMPA Board — music streaming also can benefit the publishing company’s affiliated film company by driving listeners to view movies that feature their favorite songs.¹¹ And by increasing the popularity of individual songs, interactive streaming increases the value of licenses for public performing rights and synchronization or reproduction rights. Popular songs are more likely to be played during workout classes, to form the backdrop for viral TikTok videos, and to be played on the radio or in concert.¹² If, as the Copyright Owners claim, such revenues always are relevant to assessing

⁸ See Tim Seppala, *Music Streaming Is Fueling Vinyl’s Resurgence*, Engadget (Dec. 4, 2018), <https://www.engadget.com/2018-12-04-music-streaming-is-fueling-vinyls-resurgence.html> (“experts . . . agreed that streaming and vinyl are complementary rather than competitive”).

⁹ Sony, for example, owns multiple such patents. See Press Release, Via Licensing, *Via Licensing Announces Updated AAC Joint Patent License* (Jan. 5, 2009), available at <https://manualzz.com/doc/42513026/aac-joint-patent-licensing-program-update> (explaining that “Sony Corporation” licenses “essential [Advanced Audio Coding] patents through the AAC licensing program”).

¹⁰ See *Streaming Services*, Sony, <https://www.sony.com/et/electronics/music-streaming-services-devices>; *Wireless Speakers*, Sony, <https://electronics.sony.com/audio/speakers/c/wireless-speakers>.

¹¹ See Audrey Schomer, *Spotify’s New ‘Disney Hub’ Highlights the Benefits of Cross-Platform Symbiosis*, Insider (July 22, 2019), <https://www.businessinsider.com/spotify-disney-hub-highlights-cross-platform-symbiosis-benefits-2019-7> (“For Disney, the [designated Disney Hub] section on Spotify is a marketing vehicle that simultaneously broadens the reach of its music and drives more viewers to its core IP: its theatrical slate. Spotify listeners — particularly families — who engage with Disney songs are more likely to seek further interaction with Disney content.”); Press Release, NMPA, *NMPA Welcomes Chip McLean to Board* (Jan. 29, 2014), <https://www.nmpa.org/nmpa-welcomes-chip-mclean-to-board/> (announcing “Walt Disney Company’s senior executive responsible for Disney Music Publishing (DMP)” as a member of the NMPA Board).

¹² See, e.g., Ashley King, *For Americans, Radio Is No Longer the Dominant Music Discovery Platform*, Digital Music News (Oct. 5, 2021), <https://www.digitalmusicnews.com/2021/10/05/americans-music-discovery-study-2021/> (“Popular music in 2021 is much more likely to go viral via Spotify or TikTok, rather than traditional radio. That viral popularity helps drive traditional radio plays, not the other way around.”).

what willing buyers and sellers would accept in an effectively competitive market — and thus discoverable regardless of whether that information is “directly related” to a participant’s Written Direct Statement and rate proposal — then Amazon is entitled to discovery from the Copyright Owners about these revenues.

CONCLUSION

The Judges should deny the Copyright Owners’ Motion insofar as it seeks complementary revenue documents regarding Amazon’s Prime Music service and should deny this conditional motion as well. But if the Judges accept the Copyright Owners’ novel theory and grant that Motion, the Judges should grant this motion as well.

Dated: February 22, 2022

Respectfully submitted,

/s/ Joshua D. Branson

Joshua D. Branson (D.C. Bar No. 981623)

Aaron M. Panner (D.C. Bar No. 453608)

Leslie V. Pope (D. C. Bar No. 1014920)

Scott Angstreich (D.C. Bar No. 471085)

KELLOGG, HANSEN, TODD,

FIGEL & FREDERICK, P.L.L.C.

1615 M Street, N.W., Suite 400

Washington, D.C. 20036

Tel.: (202) 326-7900

Fax: (202) 326-7999

jbranson@kellogghansen.com

apanner@kellogghansen.com

lpope@kellogghansen.com

sangstreich@kellogghansen.com

Counsel for Amazon.com Services LLC

Proof of Delivery

I hereby certify that on Tuesday, February 22, 2022, I provided a true and correct copy of the Amazon's Conditional Motion to Compel Financial Documents from Copyright Owners (PUBLIC) to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Signed: /s/ Joshua D Branson